Supreme Court, U.S.
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No. 90-5193

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1990

DAWUD MAJID MU'MIN,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

On Petition For A Writ Of Certiorari To The
Supreme Court Of Virginia

RESPONDENT'S BRIEF IN OPPOSITION

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II. WHETHER THE FACT-BOUND ISSUE CONCERNING THE IMPARTIALITY OF TWO JURORS WARRANTS CERTIORARI REVIEW.

III. WHETHER PETITIONER'S CLAIM CONCERNING ADMISSIBILITY OF EVIDENCE OF ANOTHER CRIME RAISES A FEDERAL ISSUE.

IV. WHETHER PETITIONER'S VOLUNTARINESS CLAIM WARRANTS CERTIORARI REVIEW.

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RESPONDENT'S BRIEF IN OPPOSITION

OPINION BELOW

The judgment of the Supreme Court of Virginia is a published opinion reported as Mu'Min v. Commonwealth, 239 Va. 433, 389 S.E.2d 886 (1990). A copy of the opinion is attached to the Petition for a Writ of Certiorari as Appendix A.

JURISDICTION

The jurisdiction of this Court to issue the writ of certiorari is grounded upon 28 U.S.C. § 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant constitutional and statutory provisions are set forth in the Petition at pages 1-3.

Rule 10.1 of the Rules of the Supreme Court of the United States provides in pertinent part that "[a] review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only when there are special and important reasons therefor."

STATEMENT OF THE CASE

On April 20, 1989 a jury in the Circuit Court of Prince William County convicted Dawud Majid Mu'Min of capital murder. On April 24, 1989, after a sentencing hearing, the jury fixed his punishment at death. The trial court entered final judgment on June 12, 1989, imposing the penalty fixed by the jury.

An automatic appeal was taken to the Supreme Court of Virginia, which affirmed the judgment and sentence on March 2, 1990. Petitioner's petition to set aside the judgment and grant a rehearing was denied on April 20, 1990.

STATEMENT OF FACTS[1]

On September 22, 1988 the defendant was an inmate at Virginia's Haymarket Correctional Unit serving a forty-eight (48) year sentence for a 1973 first degree murder conviction. (Tr. 4/17/89 at 97, 99). That morning, Mu'Min and five other inmates

---

[1]These facts are derived from Virginia Supreme Court Opinion, 239 Va. at 437-438, 389 S.E.2d at 889-890.

were transported to the Department of Transportation's "Dale City Headquarters" as part of their work assignment. (Tr. 4/17/89 at 99, 193, 195). There "they were put to work ... basically painting equipment, working on equipment." (Tr. 4/17/89 at 195). Late that morning the defendant was seen "grinding" a metal spike on one of the grinders in the "shop." (Tr. 4/18/89 at 177-179).

Around noon, the defendant "walk[ed] away ... in a suspicious type manner" down a pathway "around the highway department's salt dome." (Tr. 4/18/89 at 180, 221). The defendant then went over a perimeter fence and headed along Interstate 95 in the direction of the Ashdale Plaza shopping center, located approximately one mile away. (Tr. 4/18/89 at 222; Tr. 4/19/89 at 25, 42-43, 116, 280).

When Mu'Min arrived at the shopping center he entered Dale City Floors, a retail carpet and flooring store, and repeatedly attacked the owner, Gladys Nopwasky, with a "sharp instrument." (Tr. 4/17/89 at 19-20, 224-244; 4/18/89 at 284; 4/19/89 at 11-15). He took all of the money from the desk drawer near the victim's body, amounting to approximately four dollars; "tried to ... wipe [his] fingerprints off" "everything that [he had] touched;" and then returned to his prison work crew at the highway department. (Tr. 4/19/89 at 50, 96-97, 154-155, 310; 4/20/89 at 31, 46).

A few minutes after the attack, a customer discovered the victim's body on the floor in the back of the store:

> [S]he had no clothes on from the waist down and her face was bloodied and the entire area was completely -- well, there was papers strewn everywhere and blood everywhere. And her face was so badly beaten or whatever that she would have been unrecognizable.

(Tr. 4/17/89 at 264).

The customer called the rescue squad, which arrived a few minutes later. (Tr. 4/17/89 at 265, 272). The paramedic found the victim "laying [sic] face up on her back on the floor in a pool of blood that was around her head and upper body;" she was unclothed below the waist and her blouse and brassiere had been pulled up, exposing her breasts. (Tr. 4/17/89 at 273, 282). The contents of her wallet had been "scattered on the floor." (Tr. 4/17/89 at 274). The victim "was breathless and pulseless," but the "EKG machine showed an electrical rhythm," indicating that her heart was functional but there was no blood for it to pump. (Tr. 4/17/89 at 276-277).

The autopsy revealed that the victim's face, neck, chest and left arm had been stabbed or cut sixteen times with a sharp instrument. (Tr. 4/18/89 at 13-25). Two of these wounds, one "on the lower neck" and the other "on the left upper chest," were fatal. (Tr. 4/18/89 at 25). The one to the lower neck was three inches deep and severed the jugular vein. (Tr. 4/18/89 at 22). The one to the left upper chest penetrated four inches, "injured the pulmonary artery," "went into the left chest cavity" and injured the left lung. (Tr. 4/18/89 at 14, 24). The autopsy also revealed that the victim had suffered numerous "blunt-force trauma injuries," consistent with blows from a fist, causing a laceration on her forehead and bruises over a large portion of her face. (Tr. 4/18/89 at 13, 17, 18, 24).

REASONS WHY THE WRIT SHOULD BE DENIED

I. PETITIONER'S CLAIM CONCERNING THE SCOPE OF VOIR DIRE DOES NOT WARRANT CERTIORARI REVIEW.

Petitioner contends that he was denied his right to an impartial jury by the trial court's refusal to permit questioning of prospective jurors about what they had heard or read about the case. The trial court, however, directed several questions to the jurors to determine whether they had received any information about the case and, if so, whether it would affect their impartiality:

> THE COURT: Have any of you acquired any information about ... the alleged offense, or the accused from the news media or from any other source?
>
> * * *
>
> THE COURT: ... Would the information that you heard, received, or read from whatever source, would that information affect your impartiality in this case?
>
> * * *
>
> THE COURT: Considering what the ladies and gentlemen who have answered in the affirmative have heard or read about this case, do you believe that you can enter the jury box with an open mind and wait until the entire case is presented before reaching a fixed opinion or conclusion as to the guilt or innocence of the accused?
>
> * * *
>
> THE COURT: I'll repeat it in a different fashion.
>
> In view of everything that you've seen, heard or read, or any information from whatever source that you've acquired about this case, is there anyone who believes that you could not ... enter the Jury Box with an open mind and wait until the entire case is presented before reaching a fixed opinion or a conclusion as to the guilt or innocence of the accused?

(Tr. 4/17/89 at 16, 18-19).

Other questions posed by the court also would have revealed any disqualifying effects from exposure to pre-trial publicity:

> THE COURT: Are any of you sensible to any bias or prejudice against either the Commonwealth or the accused?
>
> * * *
>
> THE COURT: ... Have any of you expressed or formed an opinion of the innocence or guilt of the accused?

(Tr. 4/17/89 at 13, 19).

Furthermore, defense counsel was permitted to ask additional questions on this issue. In fact, the trial court had to prompt defense counsel to ask questions concerning pre-trial publicity.

> THE COURT: ... Next question.
>
> MS. ROLLISON [DEFENSE COUNSEL]: Nothing further.
>
> THE COURT: Excuse me. That's not all. I'll pick them up for you. You're missing one about the --
>
> MS. ROLLISON: That's correct, Your Honor.
>
> THE COURT: All right. Go ahead.
>
> MS. ROLLISON: Have you discussed this case -- we did ask that one, Your Honor.
>
> THE COURT: But I am not sure that some of these persons may not have read something about it. I'll give you an opportunity.
>
> Have any of you read anything in the newspaper concerning this case at all?
>
> MR. TAYLOR: (Indicating).
>
> MR. SMITH: (Indicating).
>
> MS. HAINES: (Indicating).
>
> THE COURT: Now go with that.

MS. ROLLISON: On the basis of what you've read in the newspapers, have you reached an opinion in this matter?

THE JURY PANEL: (Shaking heads).

MS. ROLLISON: Are any of you sensible to any bias or prejudice after what you've read in the papers in this case?

THE JURY PANEL: (No response).

MS. ROLLISON: Would all of you be able to reach a fair and impartial verdict after reading what you've read in the papers?

* * *

THE COURT: All right. Are you satisfied, Ms. Rollison?

MS. ROLLISON: Yes, Your Honor.

(Tr. 4/17/89 at 81-83).

Similarly, defense counsel was permitted to ask questions concerning information the jurors may have heard from others about the case, as demonstrated by the extensive questioning of Juror Walters on this issue:

MS. ROLLISON [DEFENSE COUNSEL]: Have you discussed this case with anyone?

MS. WALTERS: I discussed it with my Lieutenant. She lived on the same block as the victim.

MS. ROLLISON: The fact that you discussed this case with your Lieutenant, has that caused you to have an opinion in this matter?

MS. WALTERS: No.

MS. ROLLISON: Are you sensible of any bias or prejudice because of that discussion?

MS. WALTERS: Not consciously.

MS. ROLLISON: But maybe unconsciously?

MS. WALTERS: (Nodding head).

MS. ROLLISON: Would you be able to listen to the law and the evidence as presented here today, and would you be able to follow that in light of your discussion with your Lieutenant in order to deliver a fair and impartial verdict in this matter?

MS. WALTERS: I think so.

MS. ROLLISON: So you think you would be able to control your unconscious?

MS. WALTERS: Well, I would hope so. I would try to --

* * *

THE COURT: I need to be a little more specific.

You've said you're not conscious of it, you're not sure, and those sorts of things?

MS. WALTERS: I find that very hard to say, what you can keep coming in and out of your mind on what you've had in past discussions with someone.

THE COURT: I guess it comes down to this question for you, Ms. Rollison. I'm looking right at the one that's been approved.

Considering what you've heard in your discussions in that case with your Lieutenant who lived on the street with the lady that was killed, do you believe that you can enter the Jury box with an open mind and wait until the entire case is presented before reaching a fixed opinion or conclusion as to the guilt or innocence of this accused?

MS. WALTERS: Yes, I think so.

THE COURT: Is there any question in your mind about it?

MS. WALTERS: No, sir. There's no question in my mind about it.

THE COURT: Let me say this. The Jury is going to be given -- that is the ultimate Jury is going to be given an oath to try the case based upon the law and the evidence.

The law, as I said, is what I have to tell you is the law. The evidence will be what you hear. And that oath is going to be taken, so you'll be bound by that oath if you're a Juror.

With that in mind, can you reach a fair and impartial verdict based upon the law and the evidence?

MS. WALTERS: Yes, sir.

THE COURT: Are you sensible of any bias or prejudice as a result of having discussed this with a neighbor who I presume must have known the lady that was killed?

MS. WALTERS: Not as a good friend but knew who she was, yes.

THE COURT: Are you sensible of any bias or prejudice as a result of that?

MS. WALTERS: No, sir.

THE COURT: All right. Go ahead, Ms. Rollison.

MS. ROLLISON: Mrs. Walters, you indicated that you were the only one of the four of you that has discussed this case with anyone else.

Did they express an opinion to you?

MS. WALTERS: No. It was just a case of she was very sorry this happened, and she knew the person.

MS. ROLLISON: Thank you.

(Tr. 4/17/89 at 69-72).

Thus, the full voir dire of the jurors amply demonstrates that they were sufficiently questioned to determine their impartiality.

Of the sixteen jurors who had previously heard something about the case, only juror Syphrett had formed any opinion as to the petitioner's guilt or innocence, and he was excluded for that reason. (Tr. 4/17/89 at 18-21). Of course, even the existence of "preconceived notion[s] of the guilt or innocence of an

accused" based upon pre-trial publicity, is not the test for suitability for jury service. Irvin v. Dowd, 366 U.S. 717, 722-723 (1961). "It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court." Id. The jurors in question, however, had not even formed any such opinions which had to be set aside. (Tr. 4/17/89 at 19). Thus, nothing that they had heard about the case could possibly have left a disqualifying impression upon them. Moreover, as demonstrated, all the jurors who were seated on the panel of 20 indicated that nothing that they had heard about the case would affect their impartiality and that they could "enter the Jury box with an open mind." (Tr. 4/17/89 at 18-19).

The issue of juror impartiality is essentially a fact-bound question, Wainwright v. Witt, 469 U.S. 412 (1985), and in this case both the trial judge and the Virginia Supreme Court have found that the jurors who sat on petitioner's case were impartial. These factual determinations are entitled to great deference, even on direct appeal. Witt, 469 U.S. at 428-429.

Moreover, the constitutional standards regarding the scope of voir dire are clearly established. See Ristaino v. Ross, 424 U.S. 589 (1976); Turner v. Murray, 476 U.S. 28 (1986). This Court has repeatedly recognized that the primary responsibility for impaneling an impartial jury is the trial judge's and that the scope of voir dire is largely within the judge's discretion. Ristaino, 424 U.S. at 598; Turner, 476 U.S. at ___, 106 S.Ct. at 1689 n. 12. Petitioner's claim is nothing more than

that the trial judge and the Virginia Supreme Court erred in applying that standard in his case. This Court, however, does not grant certiorari merely to review claims of perceived error. Ross v. Moffitt, 417 U.S. 600, 617 (1974). Petitioner has shown no "special and important reason" which would warrant certiorari review of this claim. Rule 10.1.

II. PETITIONER'S CLAIM RE THE IMPARTIALITY OF CERTAIN JURORS DOES NOT WARRANT CERTIORARI REVIEW.

"The partiality or impartiality of an individual juror is a factual issue best determined by the trial court." Patton v. Yount, 467 U.S. 1025 (1984) ("whether jurors have opinions which disqualify them" is not a mixed question of law and fact but solely a fa ual question). Great deference is paid to the trial court's resolution of such questions, even on direct appeal. Witt, 469 U.S. at 428-429.

The applicable constitutional standards regarding juror impartiality are thus abundantly clear and nothing could be gained by granting certiorari in this case. This Court does not grant certiorari merely to review perceived errors. Ross v. Moffit, 417 U.S. at 617. Petitioner has shown no special or important reason. Rule 10.1.

III. THE ADMISSION OF EVIDENCE OF OTHER CRIMES DOES NOT RAISE A FEDERAL ISSUE.

The petitioner contends that the trial court erred in admitting evidence of the nature of the crime for which he was imprisoned when he committed the instant offense. This contention is without merit because the petitioner's prior

conviction was relevant proof of an element of his capital offense. Moreover, the claim clearly fails to state a federal issue.

One of the grounds for the capital murder indictment was that Mu'Min committed the murder "while ... [he] was a prisoner in a state or local correctional facility or while in the custody of an employee thereof." See Va. Code § 18.2-31(c). In order to prove the defendant's status as a prisoner under this theory, it was certainly relevant for the Commonwealth to introduce the conviction order which made Mu'Min a lawful prisoner of the state.

The admissibility of evidence is a question of state law. Moore v. Illinois, 408 U.S. 786 (1972). More particularly, admissibility of evidence of another crime to prove an el. ent of a capital offense does not raise a federal issue. Stockton v. Commonwealth, 852 F.2d 740, 748 (4th Cir. 1988). This Court cannot grant certiorari to review a matter which is governed by Virginia law. See also United States v. Dowling, ___ U.S. ___, 110 S.Ct. 668, 674 (1990) (evidence of other crimes does not violate Constitution).

IV. PETITIONER'S VOLUNTARINESS CLAIM DOES NOT WARRANT CERTIORARI REVIEW.

Petitioner contends that his statements to Investigator Watson on September 30, 1988 and on October 1, 1988 were involuntary.

The test for voluntariness of a confession, of course, is well established. See Miller v. Fenton, 474 U.S. 104, 117 (1985). The trial court's resolution of all factual issues surrounding a confession is binding on appeal. Id. Both the trial court and the Virginia Supreme Court, 239 Va. at 441, 389 S.E.2d at 891, resolved all of the facts against petitioner and found that his confession was voluntary. This conclusion is clearly supported by the record and therefore is binding on this Court.

The "totality of the circumstances" in the present case, includes the facts that the defendant had graduated from a private "prep" school, had received a college degree in business administration, and spoke four languages, including English as his "native" language. (Tr. 1/30/89 at 34-35, 44). He had had prior experience with the criminal justice system including the 1973 first degree murder conviction for which he was imprisoned at the time of the present offense.

Investigator Watson was the only person who questioned the defendant on both occasions. (Tr. 1/30/89 at 21, 24). The conversations did not take place at an "unusual" hour (3:45 p.m. and 7:45 p.m.). (Tr. 1/30/89 at 21, 23). Both times, as evidenced by the tape recording of this conversation, Watson fully advised Mu'Min of his Miranda rights, and both times Mu'Min waived those rights. (Tr. 1/30/89 at 21-23, 25-26). There was nothing "unusual" about Mu'Min's condition, he was "[c]oherent, sober, awake," and "seemed to understand everything that [Watson] said to him." (Tr. 1/30/89 at 23). Watson did not "promise him

anything or threaten him in any way in return for his statement." (Tr. 1/30/89 at 23).

Petitioner also conceded the voluntariness of his confession when he testified at the pretrial suppression hearing:

> Q. [PROSECUTOR]: Now Investigator Watson told you he had a microphone there and he told you this is a Miranda form, he says here, "You have the right to remain silent;" did he not?
>
> A. [MU'MIN]: Yes, he did.
>
> Q. And he said, "Do you understand that?"
>
> A. Yes.
>
> Q. And your reply was what?
>
> A. Yes.
>
> Q. Was that a lie?
>
> A. No, that's no lie.
>
> Q. You told the truth.
>
> He also told you, "Anything you can say can and will be used against you in court," and he said, "Do you understand that?"
>
> Do you recall your reply?
>
> A. Yes, I do.
>
> Q. And that was yes; was it not?
>
> A. Yes.
>
> Q. He said, "You have the right to consult with a lawyer before answering any questions and to have a lawyer with you during any questioning; do you understand that?"
>
> A. Yes.
>
> Q. And that was correct, you understood it?
>
> A. Yes, I understood it.

Q. And, "If you cannot afford a lawyer one will be provided to you free of cost if you want one; do you understand that?"

Your reply was yes, is that right?

A. Yes.

Q. And, "Do you understand your rights as I have explained them?" And your answer was yes, is that right?

A. That's right.

Q. And he also said, "Are you willing to talk with me without consulting a lawyer or having a lawyer present with you?" And your reply was yes, isn't that right?

A. Yes, it was.

Q. So ... you were able to understand what he said to you in plain English; is that correct?

A. Yes, sir.

* * *

Q. And the words that he gave you here, there's nothing in there that you didn't understand and there's nothing in there to indicate that he in any way made you say yes; isn't that correct?

A. That's correct.

* * *

Q. ... [Y]ou know lawyers are there for your benefit if you want them; isn't that right?

A. Yes.

* * *

Q. ... [O]n these occasions you had your right to a lawyer and you wanted to go ahead without one?

A. Yes, I did.

(Tr. 1/30/89 at 35-37, 39-40).

V. THE VIRGINIA STATUTORY SCHEME FOR IMPOSITION OF THE DEATH PENALTY SUFFICIENTLY BRIDLES THE JURY'S DISCRETION.

Section 19.2-264.2 "bridles" the sentencer in requiring that either "vileness" or "future dangerousness" be found beyond a reasonable doubt. It also does so at the guilt phase by narrowly defining capital murder. Virginia Code § 18.2-31. See Lowenfield v. Phelps, 482 U.S. 231, 244-246 (1988). No further narrowing is required. Nevertheless, the Virginia Supreme Court clearly accomplishes the constitutionally required narrowing function when it reviews every death sentence, including petitioner's, 239 Va. at 449-451, 389 S.E.2d at 896-898, and applies a narrowing construction to both the vileness and future dangerousness factors. See Virginia Code § 17-110.1. Both reviews were made by the Virginia Supreme Court. 239 Va. at 449-451, 389 S.E.2d at 896-898. The Court of Appeals for the Fourth Circuit, which is intimately familiar with Virginia law, has repeatedly upheld the constitutionality of Virginia's death penalty statute. See e.g. Boggs v. Bair, 892 F.2d 1193, 1196-1198, cert. denied, 110 S.Ct. 2193 (1990).

VI. THE SENTENCE WAS NOT THE RESULT OF PASSION, PREJUDICE, OR OTHER ARBITRARY FACTORS.

The Supreme Court of Virginia, as mandated by § 17-110.1 (C)(1), reviewed the record for the influence of passion, prejudice or any other arbitrary factor. 239 Va. at 448-449, 389 S.E.2d at 896. It found none, and the record reflects none. This Court has recently held that it will not look behind such

good faith reviews of death sentences by a state's highest court. See Walton v. Arizona, ___ U.S. ___, 110 S.Ct. ___ (No. 88-7351, June 27, 1990).

CONCLUSION

A writ of certiorari is not a matter of right, but of judicial discretion. It will be "granted only when there are special and important reasons therefor." Rule 10.1, Rules of the Supreme Court of the United States. Petitioner has failed to raise any claim which has any significance beyond the parameters of his case. Under these circumstances, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Thomas C. Daniel, a member of the Bar of this Court and counsel of record for respondent, hereby certify that I have this 16th day of August, 1990, served this Brief upon the petitioner by causing three copies of such document to be mailed first-class mail, with postage prepaid, to Dawud Majid Mu'Min, No. 101387, Post Office Box 500, Mecklenburg Correctional Center, Boydton, Virginia 23917.

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August 16, 1990

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The Honorable Joseph F. Spaniol, Clerk
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One First Street, N.W.
Supreme Court Building
Washington, D.C. 20543

Re: Dawud Majid Mu'Min v. Commonwealth of Virginia
Record No. 90-5193

Dear Mr. Spaniol:

Please find enclosed an original and eleven copies of the Respondent's Brief in Opposition, to be filed with the other papers in the above-referenced case.

Thank you for your consideration in this matter.

Very truly yours,

Thomas C. Daniel
Assistant Attorney General
Criminal Litigation Section

3:50/234

Enclosures

CERTIFICATE OF SERVICE

I hereby certify that on the 17th day of July, 1990, a true copy of the foregoing Motion for Leaving to Proceed In Forma Pauperis, and Affidavit in Support of Motion to Proceed on Writ of Certiorari In Forma Pauperis, and Petition for Writ of Certiorari to the Supreme Court of Virginia, all of which are being filed pro se, were mailed to the Honorable Joseph F. Spaniol, Jr., Clerk of the Supreme Court of the United States, One First Street, Northeast, Washington, DC 20543, and to the Honorable Mary Sue Terry, Attorney General of Virginia, 101 North Eighth Street, Richmond, Virginia 23219.

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The Supreme Court of the United States
One First Street, Northeast
Washington, DC 20543

PRO SE

RE: DAWUD MU'MIN vs. CCOMMONWEALTH OF VIRGINIA

Dear Mr. Spaniol:

I am inmate counsel at Mecklenburg Correcitonal Center, Boydton, Virginia, appointed pursuant to Section 53.1-40 of the Code of Virginia.

The above named individual, Dawud Mu'Min, is hereby filing a Motion for Leave to Proceed In Forma Pauperis, and Affidavit in Support of Motion to Proceed on Writ of Certiorari In Forma Pauperis, and a Petition for Writ of Certiorari to the Supreme Court of Virginia, all of which are being filed pro se.

Also enclosed you will find a copy of an order by the Supreme Court of Virginia dated April 20, 1990, denying a Petition for Rehearing.

I am today filing a copy of the motion, the affidavit, and the petition with the Honorable Mary Sue Terry Attorney General of the Commonwealth of Virginia in Richmond, Virginia.

Thank you very much.

Sincerely yours,

Harry S. Montgomery

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Enclosures